IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA

CASE NO. 1692/2017

In the matter between:

Z[…] S[…] obo O[…] S[…] **Plaintiff**

And

MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR HEALTH IN THE EASTERN CAPE **Defendant**

JUDGMENT

Bloem J.

1. This is an action for damages instituted by the plaintiff, in her personal capacity as well as her representative capacity as mother and natural guardian of her minor daughter who was born on 19 September 2013 ("the child" or "her child"), against the defendant, the Member of the Executive Council responsible for health in the Eastern Cape Province. At the commencement of the hearing and at the request

of the parties it was ordered that the issue of the defendant's alleged liability be separated from the quantification of the plaintiff's alleged damages. It was furthermore ordered that the latter issue should stand over for later determination, if necessary, and that the trial commence only in respect of the determination of whether or not the defendant was liable.

2. Two issues were identified for determination. The first was whether or not the plaintiff's personal claim against the defendant has become prescribed and the second whether the plaintiff has shown that the nurses and medical practitioners at the Dr Malizo Mpehle Hospital (the hospital) who treated the plaintiff from the time of her admission until her discharge (the medical and nursing staff) were negligent and that such negligence caused the hypoxic ischaemic injury which the child sustained shortly before her birth.

3. After the service of summons on the defendant she raised two special pleas. In the first she relied on the plaintiff's failure to serve a notice of her intention to institute legal action against the defendant within six months from 19 September 2013, as required by section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act (the Act).[1] In the second special plea the defendant alleged that the plaintiff's personal claim has become prescribed.

4. Section 3 of that Act, which deals with the notice to be given to an organ of state of intended legal proceedings, reads as follows:

> *"(1) No legal proceedings for recovery of a debt may be instituted against an organ of state unless-*
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> *(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or*

[1] Institution of Legal Proceedings Against Certain Organs of State Act, 2002 (Act No 40 of 2002).

(b) the organ of state in question has consented in writing to the institution of that legal proceedings-

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(2) A notice must-

(a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and

(b) briefly set out-

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.

(3) For purposes of subsection (2)(a)-

(a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

(b) a debt referred to in section 2(2)(a), must be regarded as having become due on the fixed date.

(4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that-

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure.

(c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate."

5. When the plaintiff realised that the defendant relied on her failure to serve a notice in terms of section 3(2)(a) of the Act, she made an application to this court on 9 November 2018 for an order that her failure in that regard be condoned. The defendant did not oppose that application. On 27 November 2018 this court condoned the plaintiff's failure to serve a notice in terms of section 3(2)(a) as read with section 3(1).

6. The parties agreed that the issue of prescription should be determined in the light of the evidence that was placed before the court in the application for condonation of the plaintiff's failure to comply with section 3(2) of the Act. Therein the plaintiff alleged *inter alia* that she accepted that her child's "*abnormality was due to an unanticipated and unavoidable event at the time of his (sic) birth*" and that she accepted that "*the staff at the hospital where I was treated at the time knew what they were doing and acted appropriately*." She furthermore alleged that during March 2018 and at Xabane Location she met a lady whose name she could not remember who had a child also suffering from cerebral palsy. The two of them shared their experiences of dealing with their respective children. It was during that conversation that the lady mentioned that she instituted legal proceedings for damages against the defendant arising "*from the negligence of the hospital staff which led to her baby having cerebral palsy*". That lady gave her the contact details of the attorney who was prosecuting her claim. The plaintiff made an appointment to see that attorney on 15 March 2018. She alleged that, based on what she had told her attorney, he expressed the opinion that "*the medical staff at the hospital were negligent in their caring for me and my baby during my labour and delivery and that this was the cause of my child's brain damage and subsequent development of cerebral palsy*". She alleged that it was the first time that she acquired knowledge that she had a claim for damages against the defendant. She accordingly instructed her attorney to give notice in terms of the

Act and to issue summons against the defendant. Summons was served on the defendant on the 13 July 2018.

7. The period of prescription is three years from 19 September 2013. Mr du Plessis, who appeared on behalf of the plaintiff, made two submissions in this regards. The first is that, when the court condoned the plaintiff's non-compliance with the provisions of section 3(2)(a) of the Act, it indirectly found that the plaintiff's personal claim against the defendant had not prescribed because in terms of section 3(4)(b)(i) the court could only condone such non-compliance if it was satisfied that her claim had not been extinguished by prescription. I would prefer not to decide the issue of prescription based on that submission. Counsel's second submission was that the debt shall not be deemed to be due until 15 March 2018 when the plaintiff was advised by her attorney that she had a claim for damages against the defendant. In this regard reliance was placed on section 12(3) of the Prescription Act[2] which reads as follows:

> *"A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."*

8. The Constitutional Court was called upon to interpret the provisions of section 12(3) of the Prescription Act in *Mtokonya v Minister of Police*[3] which was seen by that court as "*an opportunity of pronouncing once and for all on this issue so that the law becomes settled*." In that case Mr Mtokonya claimed damages against the Minister of Police arising from his unlawful arrest on 27 September 2010 and subsequent detention until his release five days thereafter. At the beginning of July 2013 Mr Mtokonya met with his attorney and

[2] Prescription Act, 1969 (Act No 68 of 1969).
[3] *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC) at para 10.

instituted action for damages against the Minister during April 2014, more than 3 years from the date of his arrest and detention. The parties requested the High Court to decide whether a plaintiff is required to have knowledge that the conduct of the defendant giving rise to the debt is wrongful and actionable before prescription can start running. The High Court held that such knowledge was not a requirement before prescription could begin to run. It accordingly upheld the Minister's special plea based on prescription and dismissed Mr Mtokonya's claim. Leave to appeal to the Supreme Court of Appeal having been refused the issue presented itself for determination by the Constitutional Court.

9. It was submitted on behalf of Mr Mtokonya in the Constitutional Court that his claim against the Minister had not prescribed because, until he consulted his attorney at the beginning of July 2013, he did not know that the conduct of the police in not bringing him before a court within 48 hours after his arrest on 27 September 2010 was wrongful and actionable and that he had a remedy in law against the police.[4]

10. Zondo J (as he then was), writing for the majority, held that section 12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from the facts from which the debt arises. The Court held that what section 12(3) requires the plaintiff to have is knowledge of the facts from which the debt arises, in other words knowledge of the facts needed to establish the defendant's liability. Section 12(3) accordingly does not require knowledge of legal opinions or legal conclusions or knowledge of the availability in law of a remedy. The learned Judge summarised the position as follows in paragraph 45:

> "*Knowledge that the conduct of the debtor is wrongful and actionable is knowledge of a legal conclusion and is not*

[4] Section 50(1)(c) of the Criminal Procedure Act, 1977 (Act No 51 of 1977).

> *knowledge of a fact. … Therefore, such knowledge falls outside the phrase 'knowledge … of the facts from which the debt arises' in s 12(3). The facts from which a debt arises are the facts of the incident or transaction in question which, if proved, would mean that in law the debtor is liable to the creditor*."

11. Applied to the facts of the present matter, those facts demonstrate that when the plaintiff consulted her attorney on 15 March 2018, she was in possession of all the material facts that were necessary to institute an action for damages. Her evidence in that regard was the following:

> *"On 15 March 2018 I consulted with Mr Nonxuba and gave him the history of pregnancy, labour and delivery of my child as well as the fact that my child has been diagnosed with cerebral palsy. Mr Nonxuba, thereafter, advised me that in his opinion the medical staff at the hospital were negligent in caring for me and my baby during my labour and delivery and that this was the cause of my child's brain damage and subsequent development of cerebral palsy."*

12. As at 19 September 2013 when the child was born, the plaintiff had knowledge of what happened during her pregnancy, labour and delivery of her child. She acquired knowledge that the child had been diagnosed with cerebral palsy either on that same day or shortly thereafter. Her cause of action was complete and the debt of the defendant became due on 19 September 2013 or shortly thereafter. That is when she had knowledge of a complete set of facts necessary to succeed with her claim against the defendant.[5] That her attorney expressed an opinion only on 15 March 2018 that "*the medical staff at the hospital were negligent*" in caring for her and her child or that it "*was the first time that [the plaintiff] became aware that [the child's] cerebral palsy was caused by the negligence of the nursing and the medical staff at the clinic and also at Dr Malizo Mpehle Hospital*" are accordingly irrelevant. It is accordingly found that the plaintiff had knowledge of

[5] *Truter and another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at para 16.

the facts from which the debt arose (the facts necessary to succeed with an action for damages) on 19 September 2013 or shortly thereafter.

13. When did the plaintiff acquire knowledge of the identity of the defendant? The only evidence in this regard was adduced by the plaintiff. She testified that on 15 March 2018 her attorney indicated that he could take on her case. He then explained to her the procedure to be followed in the execution of his mandate, if instructed. She then instructed him to institute an action on her behalf against the defendant. She testified that she became aware only then that she had a claim against the defendant. The plaintiff's evidence in this regard is unchallenged. The plaintiff's personal claim would have become prescribed if she had acquired knowledge of the identity of the debtor (i.e. that the person against whom she had to institute a claim was the defendant) before the expiry of the 3-year extinctive period on 18 September 2016. The onus was on the defendant to prove that the plaintiff had such knowledge before then.[6] The defendant did not adduce any evidence and accordingly did not discharge that onus.

14. In my view, the above evidence demonstrates that the plaintiff became aware of the identity of the defendant for the first time on 15 March 2018. Although the plaintiff had knowledge of all the facts necessary to institute an action for damages since 19 September 2013 or shortly thereafter, she did not have knowledge of the identity of the person against whom such an action should be instituted. In my view it could not be expected of a person who described herself as an "*illiterate*" and "*a lay person in respect of legal matters and medical issues*" to reasonably have had the knowledge that an action should be instituted, not only against the nurses or medical practitioners who treated (or failed to treat) her but, against the defendant who is vicariously liable for the acts or omissions of the medical and

[6] *Drennan Maud and Partners v Pennington Town Board* [1998] ZASCA 29; 1998 (3) SA 200 (SCA); [1998] 2 All SA 571 (A) at 204F-G.

nursing staff who were at all material times acting within the course and scope of their employment as employees of the Department of Health of the Eastern Cape, the defendant being the political head thereof.[7]

15. In the circumstances, despite the fact that the plaintiff had knowledge of the facts necessary for her to institute an action for damages, it is found that her personal claim against the defendant had not prescribed by 13 July 2018 when the summons was served on her. That is so because she acquired knowledge of the identity of the person against whom the action should be instituted only on 15 March 2018, the date from which prescription commenced to run. The defendant's special plea of prescription against the plaintiff's personal claim should accordingly be dismissed.

16. Save for prescription, nothing was placed in dispute in respect of the merits of the plaintiff's personal claim. Regarding the merits of the plaintiff's claim on behalf of her child, the defendant placed in issue whether the intrapartum hypoxic ischaemic injury was caused by the negligence on the part of the medical and nursing staff.

17. Negligence, for purposes of liability, arises if:

    17.1. a *diligens paterfamilias* in the position of the defendant:

        17.1.1 would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
        17.1.2 would take reasonable steps to guard against such occurrence; and

    17.2 the defendant failed to take such steps.[8]

[7] *MEC for Education, KwaZulu-Natal v Shange* [2012] ZASCA 98; 2012 (5) SA 313 (SCA) at 319D-E.
[8] *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.

18. In her plea the defendant admitted that the medical and nursing staff were under a legal duty to provide medical, surgical, nursing, monitoring, advisory, supervisory and midwifery services in relation to the plaintiff's pregnancy and the delivery of her unborn child with such skill, care and diligence that could reasonably be expected of nursing staff and medical practitioners involved in providing the above services. The defendant furthermore admitted in her plea that during September 2013 the plaintiff and the medical and nursing staff, the latter having been authorised to do so, concluded an agreement in terms whereof the medical and nursing staff would provide care and treatment to the plaintiff for the delivery of her child of a standard reasonably expected of medical and nursing staff in similar circumstances practising at a public health establishment. The parties have agreed that the standard of the services to be provided by the nursing staff are set out in The Guidelines for Maternity Care in the Republic of South Africa prepared and issued by the Department of Health of South Africa in 2007 (Third Edition) (the Guidelines). In this regard reference is made to the reports of the parties' expert obstetrician and gynaecologists who both relied on the Guidelines when they compiled their reports.

19. The parties have agreed that the issues of negligence could be determined in the light of a joint minute prepared by their respective obstetrician and gynaecologists, Dr Chimusoro for the plaintiff's and Dr van Helsdingen for the defendant, against the background of their respective reports. Because there was agreement on the facts set out in the joint minutes, there was no need to adduce evidence in respect thereof. This court has to accept those facts agreed upon by the experts.[9] The relevant part of the agreement contained in the joint minute that was signed by Drs Chimusoro and van Heldingen on 30 September 2019 reads as follows:

[9] *BEE v Road Accident Fund* [2018] ZASCA 52; 2018 (4) SA 366 (SCA) at para 73.

"*5. On 18th September 2013 she was reviewed at 07h40, 11h30 and 17h40 (*The time (17h04) is obviously wrong regard being had to the various medico-legal reports and hospital records) assessed as being in the latent phase of labour. This represents sparse intrapartum monitoring.*

6. On 19th September 2013 at 04h40 she was found to be 6cm dilated with ruptured membranes at about 23h00 18/06/2013. This represents a long period without foetomaternal monitoring.

7. At 06h40 on 18th September she was seen and her foetal heart rate was stated as 173-i.e. foetal tachycardia.

8. The records state she was diagnosed as having foetal distress at 06h40, the criteria are not sated but the prior recorded foetal tachycardia gives credence to this diagnosis.

9. The records show that the foetal heart was checked 1 hour apart until delivery at 07h54.

10. Her intrapartum monitoring was substandard - the recorded foetal heart is not in relation to contractions.

11. Her blood pressure elevation was not managed with urgency or significance it requires in labour.

12. The poor foetal outcome could have been avoided with appropriate intrapartum foetal monitoring and earlier expedited delivery for this lady's labour."

20. The experts agreed that the monitoring of the plaintiff and her unborn child at 07h40, 11h30 and 17h04 on 18 September 2013 when she was in the latent phase of labour[10] was not as frequent as they should have been. The monitoring and accordingly the care of the plaintiff and her unborn child did not meet the standard set out in the Guidelines. In terms of the Guidelines a woman in the latent phase of labour should have her blood pressure, temperature and pulse rate recorded 4 hourly, uterine contractions and foetal heart rate should be recorded every 2 hours and a vaginal examination should be done every 4 hours.

[10] Latent phase of labour is defined in the Guidelines as the period when the woman's cervix is less than 4cm dilated and more than 1cm long.

21. In this case there was no foetal heart monitoring from 11h30 until 17h40 on 18 September 2013, a period of approximately 6 hours. There was also no monitoring between 17h40 on 18 September 2013 and 04h40 on 19 September 2013, a period of approximately 11 hours. It means that during those periods the child's condition was unknown.

22. When the plaintiff was monitored at 04h40 on 19 September 2013 it was noted that her cervix was 6 cm dilated. It means that she was in the active phase of labour.[11] According to the Guidelines, during that phase of labour the foetal heart rate should be monitored every half an hour. At 06h40 on 19 September 2013 (not 18 September 2013 as stated in paragraph 7 of the above joint minute) when the foetal heart was monitored, it was noted that it was in distress.[12] With the diagnoses of the child being in distress, there was a greater need for the Guidelines to have been followed even more closely, namely that the foetal heart should have been monitored every half an hour. However, the records show that from 04h40 until the child was delivered by caesarean section at 07h54, the foetal heart rate was not monitored every half hour. It was monitored 1 hourly.

23. It was known to the medical and nursing staff that the plaintiff had hypertension during her pregnancy. A woman who is pregnant for the first time, as was the position in this case, is a high risk during labour due to the risk associated with prolonged and obstructed labour. Such a patient needs to be monitored diligently so that if there are problems, they could be identified and specific measures applied to correct them and to remove the risk of prolonged labour. Except for being pregnant for the first time with its associated risks, the plaintiff had an added problem of hypertension which could result in complications for both mother and

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[11] Active phase of labour is defined in the Guidelines as the period when the woman's cervix is more than 4cm dilated and less than 1cm long.

[12] *Foetal tachycardia* was recorded, which I understand to be that there was abnormal rapidity of the child's heart action.

foetus. One such problem is a compromised placental blood supply which, in turn, compromises the oxygen supply to the foetus.

24. During the latent phase of labour a maternal blood pressure should be recorded every 4 hours and during the active phase 1 hourly. In this case the records show that, despite the plaintiff's elevated blood pressure, she was not monitored between 11h30 and 17h40 on 18 September 2013, and again between 17h40 on 18 September 2013 and 04h40 on 19 September 2013. During the above periods the plaintiff required frequent monitoring to assess her response to treatment. During that period it was important to test her urine for proteinuria. The monitoring and testing did not take place.

25. High blood pressure is defined as a value of 140/90 mmHg or higher on two occasions at least 4 hours apart. Normal blood pressure is below 120/80 mmHg. In this case the plaintiff's blood pressure was recorded on 11 September 2013 as 166/99 at 09h05 and 159/102 at 11h55. On 17 September 2013 it was recorded as 149/89 at 08h57 and 150/101 at 11h15. The blood pressure was not recorded at 11h30 and 17h40 on 18 September 2013. The plaintiff's blood pressure was also not monitored 4 hourly on 18 September 2013. It was monitored only twice on that day. Her blood pressure was recorded as 141/98 at 06h55 on 19 September 2013.

26. The above facts demonstrate that the experts were justified to agree that the elevation of the plaintiff's blood pressure was not properly managed with the urgency or significance it required while she was in labour. That agreement is important if regard is had to the fact that the plaintiff was pregnant for the first time and had been diagnosed with hypertension.

27. I am of the view that reasonable nurses in the position of the nursing staff who treated the plaintiff on 18 and 19 September 2013 would have foreseen the

reasonable possibility of harm to the plaintiff and her unborn child and would have taken steps to guard against its happening. Reasonable nurses would have foreseen that their failure to regularly monitor the plaintiff and the foetal heart rate would harm the plaintiff and her unborn child. Regular monitoring would have warned those nurses of a developing injury to the child's brain if starved of oxygen during labour and that such an injury would have adverse consequences for the plaintiff and her child. Such nurses would have taken reasonable steps to guard against the plaintiff and her unborn child being harmed by performing an intrauterine resuscitation[13] and, depending on the plaintiff and her child's response thereto, the timeous delivery of the child by caesarean section. The nursing staff in this case failed to take such steps. In all the circumstances, I am satisfied that the plaintiff proved on a balance of probability that the nursing staff who treated the plaintiff were negligent.

28. The facts demonstrate that the experts were justified to agree that the monitoring of the plaintiff and the foetal heart rate while the plaintiff was in (the latent and active stages of) labour was substandard. The failure of the nursing staff to measure up to the reasonable standard of skill and care set out in the Guidelines amounted to negligence. Their treatment of the plaintiff did not conform to the standard of care demanded by the law.

29. The next issue to decide is whether the nurses' negligence factually caused the hypoxic ischaemic injury. For purposes of liability it is insufficient for a plaintiff to prove that a defendant was negligent. The plaintiff must go further and prove that such negligence caused him or her harm. In other words, the plaintiff must prove a causal connection between the defendant's negligence and the harm suffered by him or her.[14]

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[13] The application of specific measures with the aim of increasing oxygen delivery to the placenta and umbilical blood flow, in order to reverse hypoxia and acidosis.
[14] *Minister of Police v Skosana* 1977 (1) SA 31 (AD) at 34E-G.

30. In my view the plaintiff has succeeded to show that if the plaintiff and the foetal heart rate had been monitored as set out in the Guidelines, the probabilities are that the result would have been different in that the nursing staff would have been alerted to the problems associated with a prolonged labour and a delivery by caesarean section would have been arranged earlier. The injury to the child's brain would probably have been avoided.

31. In all the circumstances, it is held that the plaintiff has established on a balance of probabilities that the defendant is liable to her, in both capacities, for the hypoxic ischaemic injury caused by the negligence of the nursing staff at the Dr Malizo Mpehle Hospital. There is no reason why costs should not follow the result.

32. In the result it is ordered that:

33.1 The defendant is liable to pay 100% of all damages that the plaintiff, in her personal and her representative capacity for and on behalf of her minor child, Onako, suffered as a result of the brain injury negligently caused to Onako by the defendant's employees.

33.2 The determination of the quantum of the plaintiff's damages shall stand over for determination at a later stage.

33.3. The defendant shall pay the plaintiff's costs of suit to date hereof, such costs to include:

33.3.1 the costs of senior counsel;

33.3.2 the travelling and accommodation expenses of the plaintiff's legal representatives and witnesses for purposes of consultation and trial;

33.3.3 the costs incurred in obtaining medico-legal reports, including any supplementary reports, addendums and joint minutes, as well as,

where necessary, the qualifying, attendance, reservation and preparation by the following experts:

33.3.3.1 Dr Kara;

33.3.3.2 Dr Chimusoro;

33.3.3.3 Prof Andronikou, and

33.3.3.4 Lesley Fletcher.

33.4. The defendant shall pay interest on the aforesaid costs from date of *allocatur* to date of payment thereof.

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G H BLOEM

Judge of the High Court

For the plaintiff:	Adv D T du Plessis SC, instructed by Nonxuba Inc, Johannesburg and Potelwa and Co, Mthatha.
For the defendant:	Adv N James, instructed by Norton Rose Fulbright, Johannesburg and Smith Tabata Attorneys, Mthatha.
Date of hearing:	5 November 2019.
Date of delivery of the judgment:	19 November 2019.